

The Latest In The NLRB Handbook Saga? Another Unlawful Recording Policy Fails To Pass Muster

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Last month, the National Labor Relations Board (NLRB) yet again shed further light on its analysis – and increased scrutiny – of employers’ handbook policies. The NLRB’s decision in *T-Mobile USA, Inc.*, 363 NLRB No. 171 (Apr. 29, 2016), serves as a follow-up to an earlier decision with respect to rules restricting employees’ use of recording devices. We talked about the *T-Mobile* decision in our [post](#) last week and thought we would continue the discussion by elaborating on another of the board’s decisions on recording rules. In one of many recent decisions scrutinizing employer handbook policies, the board in *Whole Foods* evaluated an employer rule prohibiting the use of recording devices on company premises. *Whole Foods*, 363 NLRB No. 87 (Dec 24, 2015). The NLRB specifically explained that it was not holding that all rules regulating recordings are invalid. Rather, the board found “only that recording may, under certain circumstances, constitute protected concerted activity under Sec. 7 and that rules that would reasonably be read by employees to prohibit protected concerted recording violate the Act.” *Id.* at *3, n.9. The NLRB further explained that employers are not prohibited from maintaining rules restricting or prohibiting employee use of recording devices, but they must be **narrowly drawn** so that employees understand that Sec. 7 activity is not restricted. This was the board’s issue with respect to the Whole Foods policy, as it found the rules to be overly broad. The board relied on the fact that the rules applied regardless of the type of activity engaged in and that it covered all recordings. The *T-Mobile* decision, which we wrote about last week, provides additional insight on how to interpret *Whole Foods*. In *T-Mobile USA, Inc.*, 363 NLRB No. 171 (Apr. 29, 2016), the board found the following policy to be unlawful:

To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information, employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when participating in an authorized [] activity or with permission from an employee’s Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

Id. at *4. The administrative law judge found that T-Mobile had set forth valid, nondiscriminatory rationales for the rule, including maintaining a harassment-free work environment and protecting trade secrets, and that the rule was narrowly tailored to these interests. However, the NLRB reversed, noting that “[t]he rule does not differentiate between recordings that are protected by Section 7 and those that are not, and includes in its prohibition

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recordings made during nonwork time and in nonwork areas.” *Id.* at *5. Notably, though, the policy did state that the restriction is limited to recordings “in the workplace.” With respect to the policy justifications alleged, the board conducted the following analysis:

1. Harassment: T-Mobile asserted that its recording prohibition was in place to prevent harassment and noted that, under federal and state laws, employers have an affirmative obligation to prevent harassing conduct. However, the NLRB found that the recording prohibition was not narrowly tailored to this interest. The board noted that it neither cited laws regarding workplace harassment nor specified that the restriction is limited to recordings that could constitute unlawful harassment.
2. Confidential information: T-Mobile asserted as an additional justification its interest in protected confidential information in the workplace. The NLRB noted that the employer’s other policies defined “confidential information” as inclusive of employee information such as employee contact information and wage and salary information. The board also cited *Whole Foods* and said that the employer’s interest in protecting confidential information was too insufficient to justify the broad prohibition on recording.

While *Whole Foods* indicated that such policies are not *per se* unlawful, the *T-Mobile* decision makes clear that simply inserting business justifications into the policy will not distinguish the lawful from the unlawful. The board seems to be closely scrutinizing the justifications and requiring detailed explanations thereof. The decisions in *T-Mobile* and *Whole Foods* indicate that the NLRB will also require that a rule carve out recordings that would be considered protected activity under the Act, and it appears – at least for now – that rules which fail to do so will be struck down. *T-Mobile* teaches us that, while recording rules are still lawful in some circumstances, the rules must be especially specific with regard to their application and justifications.

Employers should continue to closely monitor NLRB decisions to stay up-to-date on all decisions analyzing employer handbook policies.